STATE OF MICHIGAN

COURT OF APPEALS

MARCY HILL, PATRICIA HILL and CHRISTOPHER HILL,

Plaintiffs-Appellees/Cross-Appellees,

v

SEARS ROEBUCK & CO. and SEARS LOGISTIC SERVICES, INC.,

Defendants-Cross-Appellants,

and

EXEL DIRECT, INC. and MERCHANT DELIVERY, INC.,

Defendants-Appellees/Cross-Appellants,

and

MARK PRITCHARD and TIMOTHY DAMERON,

Defendants-Appellants,

and

CHARLES R. LINDSEY, ORALIA J. LINDSEY and ALBERT KIMPE,

Defendants.

UNPUBLISHED
May 24, 2011

No. 295071
Macomb Circuit Court
LC No. 2007-003755-NO

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

Defendants Mark Pritchard and Timothy Dameron appeal by way of leave granted the trial court's denial of their motion for summary disposition. On appeal, defendants assert that

the trial court erred in concluding that there was a genuine issue of material fact relating to whether they owed a duty to plaintiffs. Additionally, defendants-cross-appellants Exel Direct, Inc. ("Exel)", Merchant Delivery, Inc. ("Merchant"), Sears Roebuck & Co. ("Sears") and Sears Logistic Services, Inc. ("Sears Logistic") cross-appeal the trial court's denial of their motions for summary disposition. Defendants-cross-appellants assert that the trial court failed to address each of their theories in favor of summary disposition and that the court further erred in denying their motions for reconsideration. We affirm.

Defendants and defendants-cross-appellants each assert that the trial court erred in denying their motions for summary disposition where plaintiffs failed to demonstrate that any duty was owed in this instance. We disagree.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). Furthermore, this case involves a determination of whether plaintiffs were owed a duty. The trial court's determination that no duty existed is subject to de novo review. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

The trial court concluded that the various defendants owed a duty to plaintiffs. Specifically, the court held that there was a duty to not increase the risk of harm to the plaintiffs that was posed by the uncapped gas line. "Whether a defendant owes a plaintiff a duty of care is a question of law for the court." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). A duty can be created by a contractual relationship, a contract or an application of the common law. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). As our Supreme Court has stated, "whether a duty is owed depends on whether harm is reasonably foreseeable." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 90; 679 NW2d 689 (2004). The Supreme Court has further explained that when determining whether a duty exists under the common law, the following factors are relevant:

> (1) [T]he relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of connection between the conduct and injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and, (7) finally, the burdens and consequences of imposing a duty and the resulting liability for breach. The inquiry is ultimately a question of fairness involving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. [*Cummins v Robinson Twp*, 283 Mich App 677, 693; 770 NW2d 421 (2009), quoting *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006).]

"[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *In re Certified Question*, 479 Mich 498, 505; 740 NW2d 206 (2007).

On appeal, the various defendants argue that the court's finding regarding the existence of a duty was precluded by *Fultz v Union Commerce Assoc, 470 Mich 460; 683 NW2d 587 (2004)*. In *Fultz*, the plaintiff slipped and fell in an icy parking lot. She subsequently brought a negligence cause of action against the landowner and a contractor. The landowner had hired the contractor to plow and salt the parking lot and, on the day in question, the contractor had allegedly failed to fulfill its contractual duties. *Fultz*, 470 Mich at 461-462. Our Supreme Court ultimately held that no cause of action could be brought against the contractor. The Court stated that the contractor owed no duty to the plaintiff where the plaintiff failed to specify a duty that was separate and distinct from the contractual agreement with the landowner. The Court explained:

> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id*. at 467.]

Defendants argue on appeal that any alleged duty in this case was not separate and distinct from the contractual duties owed to plaintiffs. As stated in *Fultz*, "a subcontractor breaches a duty that is 'separate and distinct' from the contract when it creates a 'new hazard' that it should have anticipated would pose a dangerous condition to third persons." *Fultz*, 470 Mich at 468-469.

When plaintiffs purchased the home the previous owners did not leave the gas dryer that had been installed. Upon uninstalling the dryer, those owners apparently failed to cap the gas line. Therefore, the original hazard at the home was the uncapped and exposed gas line. When Pritchard and Dameron delivered the electric dryer, the evidence indicates that they installed the dryer in a way that concealed the uncapped gas line. A concealed and uncapped gas line is a different hazard than a gas line in plain sight. Had the gas line never been concealed, or had plaintiffs been told of its existence prior to it being concealed, Marcy Hill may have realized that the uncapped line was the source of the gas smell on the day in question. Unlike in *Banaszak v Northwest Airlines, Inc, 477 Mich 895; 722 NW2d 433 (2006)*, the hazard in this case was not the subject of the contractual duty. Rather, the hazard that allegedly caused the explosion did not exist until Pritchard and Dameron installed the dryer in a way that prevented the discovery of the uncapped gas line. Like the trial court, we conclude that it is proper to impose a duty in this instance. It was reasonably foreseeable that the concealed and uncapped gas line in plaintiffs' home would cause serious damages. The social benefits of requiring delivery men to refrain from concealing obvious hazards exceed the minimal social cost. Consequently, the trial court properly concluded that Pritchard and Dameron owed plaintiffs a duty in this instance.

Defendants-cross-appellants next assert that the trial court erred in determining that there was a genuine issue of material fact regarding proximate causation. We disagree.

"'[A] proximate cause' is 'a foreseeable, natural, and probable cause' of 'the plaintiff's injury and damages.'" *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008), quoting *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004). "In order to be a proximate cause, the negligent conduct must have been a cause of the plaintiff's injury and the plaintiff's injury must have been a natural and probable result of the negligent conduct. These two prongs are respectively described as 'cause-in-fact' and 'legal causation.'" *O'Neal v St John Hosp & Medical Center*, 487 Mich 485, 496; 791 NW2d 853 (2010). To establish factual causation, a "plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 184 (2009). Furthermore, the "mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant." *Id*. Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Helmus v Michigan Dept of Transp*, 238 Mich App 250, 256; 604 NW2d 793, 797 (1999). While the question of causation is typically reserved for the jury, the trial court may decide the issue if there is no genuine issue of material fact. *Genna*, 286 Mich App at 418. "Finally, it is well-established that the proper standard for proximate causation in a negligence action is that the negligence must be 'a proximate cause' not 'the proximate cause.'" *O'Neal*, 487 Mich at 497.

We conclude that there is a significant and genuine issue of material fact relating to proximate causation. The explosion in question occurred when Marcy Hill unknowingly opened an uncapped gas valve in her home. After the valve remained open for several hours, Marcy's daughter Patricia lit a candle. The open flame and the flowing gas combined and resulted in an explosion. Four years prior to the actions of the various plaintiffs, Pritchard and Dameron installed an electric dryer in a way that concealed the existence of the uncapped gas line.

In order to hold that there is a genuine issue of material fact regarding proximate causation, this Court must conclude that a reasonable jury could find that the injuries that occurred were the natural and probable result of Pritchard and Dameron's conduct. While a reasonable jury could conclude that the conduct of Marcy and Patricia Hill was a proximate cause of their own injuries, such a conclusion would not preclude a jury from finding that Pritchard and Dameron's conduct served as a proximate cause as well. As stated above, proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Helmus*, 238 Mich App at 256. While plaintiffs' conduct was certainly an independent cause without which the injuries would not have occurred, that conduct was not necessarily unforeseen. A jury could certainly conclude that it was foreseeable that plaintiffs, not knowing the location and existence of the uncapped gas line, would eventually be harmed by the concealed hazard. Had Pritchard and Dameron not created a new hazard by concealing the uncapped gas line, Plaintiffs could have theoretically discovered and eliminated the original hazard well before the eventual explosion. As plaintiffs note, the proximate cause of an injury is not necessarily the most immediate. In *Parks v Starks*, 342 Mich 443, 447; 70 NW2d 805 (1955), our Supreme Court quoted 38 *Am Jur, Negligence*, §55, which provides:

> The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural, and continuous sequence between and act and an injury, * * * the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance.

Defendants-cross-appellants emphasize the amount of time that passed between Pritchard and Dameron's conduct and the accident. The mere fact that plaintiffs' own conduct occurred closer in time to the accident does not preclude a jury from finding that the conduct associated with the various defendants was also a proximate cause.

Defendants-cross-appellants next assert that whether Pritchard and Dameron potentially injured plaintiffs through negligent acts is irrelevant to all of the other defendants because Pritchard and Dameron were acting as independent contractor at all times. We disagree and conclude that there is a genuine issue of material fact regarding whether Pritchard and Dameron were acting as the agents of Sears, Sears Logistic, Exel and Merchant. Therefore, it remains possible that those defendants could be held vicariously liable for any negligent acts committed by Pritchard and Dameron.

"It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004). An independent contractor is "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc, 236 Mich App 67, 73; 600 NW2d 348 (1999).* In order to determine whether an individual is properly classified as an independent contractor, a number of factors are relevant. While an agreement that explicitly classifies an individual as an independent contractor is relevant to the determination, it is not controlling. *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 234; 761 NW2d 284 (2008). The courts of this state generally apply the economic reality test when determining the employment status of an individual. *Id*. That test requires the consideration of the following factors: "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id*., quoting *Askew v Macomber*, 398 Mich 212, 217-218; 247 NW2d 288 (1976). None of the individual factors of the economic reality test are determinative. *Id*.

The trial court determined that summary disposition was improper where there was a genuine issue regarding whether Pritchard and Dameron were properly classified as agents or independent contractors. We agree with that assessment. As this Court has explained, "the existence and scope of an agency relationship are questions of fact for the jury." *Whitmore v Fabi*, 155 Mich App 333, 338; 399 NW2d 520 (1986). The parties agree that the agreement that Exel and Merchant had with Pritchard explicitly provides that the agreement creates an independent contractor relationship and not an employment relationship. As stated above, while that evidence favors a finding of an independent contractor relationship, it does not definitively settle the issue. In contrast to the language of the agreement, plaintiffs cite to the deposition testimony of Ryan Tollitsky, an Exel employee. Tollitsky testified that each individual who Exel

hires as an independent contractor must participate in the "Five Star training." During that training, the independent contractors receive training regarding how to present themselves to customers and are provided with guidelines that they should follow when making deliveries. Upon completion of the five star training, the independent contractor is then trained how to install the equipment. That training is conducted by a master contractor. The master contractor is an independent contractor who has "demonstrated superb customer service" and has had a minimal number of damage claims. In the present case, Pritchard was a master contractor and Dameron was a "second driver." As a second driver, Dameron would not have been trained by Exel. In addition to the training programs that Exel facilitates for its independent contractors, Exel also entered a Home Delivery Carrier Agreement with Sears. That agreement provides that Exel may employ the services of subcontractors. It further provides that Sears has no right or duty to supervise said subcontractors.

While it is clear that Exel characterized Pritchard as an independent contractor, it is equally clear that Pritchard underwent training regarding how to interact with customers, complete deliveries and install equipment. It is likewise clear that Pritchard also administered such training sessions as he enjoyed the status of master contractor. It is not entirely clear what the training sessions entailed. However, based on Tollitsky's deposition testimony, there is certainly reason to believe that Exel exercised a certain amount of control over the delivery teams that it engaged. Because the existence and scope of an agency relationship is generally a question for a finder of fact, we conclude that it would be improper to grant summary disposition to the various defendants on this basis where the evidence in the record does not clearly establish the nature of the relationship between the various parties.

Finally, defendants-cross-appellants assert that the trial court abused its discretion in denying their motion for reconsideration. We disagree.

This Court reviews a trial court's denial of a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Consequently, the trial court's ruling must be affirmed unless this Court determines that it was outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

"A party bringing a motion for reconsideration must establish that: (1) the trial court made a palpable error, and (2) a different disposition would result from correction of the error." *Luckow v Luckow*, ___Mich App ___; ___ NW2d ___ (2011), slip op at 5. In their motion for reconsideration and on appeal, defendants-cross appellants asserted that the trial court's grant of summary disposition was in error and should be reconsidered where the trial court failed to consider several of the arguments in support of the motion. Specifically, defendants-cross-appellants argued that the trial court failed to consider the following arguments: the impact of *Fultz* on plaintiffs' duty argument, whether plaintiffs improperly relied on the National Fuel and Gas Code, whether plaintiffs had established proximate causation, and whether plaintiffs' case was based on speculation and conjecture. In denying the motion, the trial court stated that it had considered each of the arguments and that no palpable error occurred. Defendants-cross-appellants now assert that any one of those arguments would have been sufficient to grant their motion for summary disposition.

We conclude that there is no evidence that the trial court failed to consider any of the issues presented in the motion for summary disposition. It is clear from the trial court's opinion that it did consider the impact of *Fultz* and its progeny. Furthermore, although the trial court did not address whether plaintiffs improperly relied upon the National Fuel and Gas Code in support of their theory of duty, the argument became irrelevant when the court concluded that a duty existed that was not related to that code.

We have concluded that none of defendants' or defendants-cross-appellants' other issues on appeal have merit. Further, there is no authority for the notion that a trial court must address each argument in support of a motion for summary disposition on the record. Therefore, because the trial court's denial of the motions for summary disposition was proper, defendants-cross-appellants cannot demonstrate that the court committed palpable error when it denied the motion for reconsideration.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly